92-130

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor can exclude from consideration entirely the "various classes of laborers . . ." (40 U.S.C. § 276a) when determining whether a "helper" class is a "prevailing" classification under the Davis-Bacon Act.

2. Whether the "helper" regulation conforms to the requirements of the Administrative Procedures Act where the sole rationale for excluding practices of "various classes of laborers . . ." advanced by the Secretary of Labor is her alleged "experience," and where her justification for the rule is totally unsupported and contradicted by the record.

3. Whether the court of appeals can adopt the *post hoc* rationalization of counsel that the Secretary of Labor will consider the practices of "various classes of laborers . . ." in determining whether a "helper" is "prevailing" under the Davis-Bacon Act, where that rationalization is inconsistent with the Secretary's own explanation for her regulation.

4. Whether Congress, in enacting two recent appropriations bills during the *same* session prohibiting the Secretary of Labor from expending funds to "implement or administer" the helper regulation (or "any other regulation" with "the same or similar effect"), intended permanently to bar the Secretary from so acting.

PARTIES

The following parties appeared below as plaintiffs-appellants:

Building and Construction Trades Department, AFL-CIO;

American Federation of Labor and Congress of Industries Organizations (AFL-CIO);

Laborers' International Union of North America, AFL-CIO;

International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO;

International Union of Bricklayers and Allied Craftsmen, AFL-CIO;

United Brotherhood of Carpenters and Joiners of America, AFL-CIO;

International Brotherhood of Electrical Workers, AFL-CIO;

International Union of Elevator Constructors, AFL-CIO;

International Union of Operating Engineers, AFL-CIO;

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO;

Tile, Marble, Terrazzo, Finishers and Shopmen International Union, AFL-CIO;

International Union of Painters and Allied Trades, AFL-CIO;

Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO;

United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO;

Sheet Metal Workers' International Association, AFL-CIO;

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO

The following parties appeared below as defendants-appellees:

Lynn Martin
Secretary of Labor
United States Department of Labor

Elizabeth H. Dole
Secretary of Labor
United States Department of Labor

The *amicus curiae* below were Associated Builders and Contractors, Inc. and the Landmark Center for Civil Rights.

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PETITION FOR A WRIT OF CERTIORARI

The Building and Construction Trades Department, AFL-CIO and its fifteen affiliates, including the Laborers' International Union of North America, AFL-CIO, petition this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Building and Construction Trades Department ,et al., v. Martin, et al.*, 961 F.2d 269 (D.C. Cir. 1992).

OPINIONS BELOW

The decision of the District of Columbia Circuit has been published at 961 F.2d 269 (D.C. Cir. 1992) and is reprinted as Appendix A in the separately bound Appendix ("App.") to this certiorari petition. App. 1a-15a. The decision of the United States District Court for the District of Columbia is published at 116

Lab. Cas. (CCH) ¶ 35,395 (D.D.C. 1990) and is reprinted as Appendix C. App. 60a-71a. Other decisions below include the decision of the District of Columbia Circuit published at 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984), reprinted as Appendix B. App. 16a-59a; the original decision by the United States District Court for the District of Columbia, published at 553 F.Supp. 352 (D.D.C. 1982), reprinted as Appendix D. App. 72a-78a; the decision of the United States District Court for the District of Columbia upon remand from the District of Columbia Circuit, published at 102 Lab. Cas. (CCH) ¶ 34,648 (1984), reprinted as Appendix G. App. 101a-103a; and the decision of the District Court for the District of Columbia denying petitioners' motion for a stay pending appeal, which is not published, reprinted as Appendix F. App. 98a-100a.

JURISDICTION

The order and judgment of the District of Columbia Circuit were entered on April 21, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Davis-Bacon Act, as amended, 40 U.S.C. §§ 276a-276a-5; Section 303 of the Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102-27, 105 Stat. 130-160 (April 10, 1991); and Sections 553 and 706 of the Administrative Procedures Act, as amended, 5 U.S.C. § 553, § 706, are reprinted in Appendix CC. App. 520a-526a.

STATEMENT OF THE FACTS AND THE CASE

This case involves a dispute over the legality of regulations promulgated by the Secretary of Labor that permit expanded use of classifications of unskilled and semi-

skilled construction workers called "helpers" on government-funded construction projects subject to the prevailing wage requirements of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5. App. 520a-522a.

1. The First Helper Regulation

Under the Davis-Bacon Act, the Secretary of Labor is directed to determine the prevailing local wage rates for the "various classes of laborers and mechanics" engaged in the performance of federal and federally-assisted construction contracts. 40 U.S.C. § 276a *et seq.* App. 520a-522a.

In May, 1982, the United States Department of Labor ("DOL") published revised regulations implementing the Davis-Bacon Act and the labor standards provisions in other federal statutes that incorporate the Davis-Bacon prevailing wage setting technique, referred to as the "Related Acts." These regulations included, *inter alia*, new provisions intended to allow expanded use of "helpers" on Davis-Bacon projects. 47 Fed. Reg. 23644, 23658 (May 28, 1982). App. 181a, 232a. Specifically, the 1982 regulations, through a definition of the term "helper", sought to reverse longstanding DOL practice by allowing some overlap between the duties of helpers and higher-paid journeymen and laborers. The 1982 regulations provided further that a helper classification would need to be only "identifiable", rather than "prevailing", in an area in order to be included in a Davis-Bacon wage determination. App. 194a-196a, 202a-209a, 224a, 236a-239a, 250a-257a, 271a, 277a.

2. The First Court of Appeals Decision

The Building and Construction Trades Department, the AFL-CIO, and its affiliated national and international unions, including the Laborers' International Union of North America (hereinafter "the Building Trades, *et al.*") challenged several of the May, 1982 regulations, including the "helper" regulations. The district court issued a permanent injunction in *Building and Construction Trades Department, AFL-CIO v. Donovan*, 553 F.

Supp. 352 (D.D.C. 1982) (App. 72a-78a), prohibiting the Secretary of Labor from implementing all but one of the challenged regulations. The Secretary appealed the district court's ruling; the court of appeals, reversing much of the district court's ruling, upheld the Secretary's new definition of "helper" that provided for a helper to perform overlapping duties of higher-paid journeymen and laborers. *Building and Construction Trades Department, AFL-CIO v. Donovan*, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). App. 16a-59a.

Nevertheless, the court of appeals affirmed the district court's order blocking the portion of the Secretary's regulations that would have permitted issuing a wage determination for a helper classification where "identifiable" in a locality, and ruled that such clasifications could only be issued where they are found to be "prevailing" in the area. 712 F.2d at 624-626. App. 36a-54a. Upon remand, the district court vacated the injunction on the helper definition, which is now codified at 29 C.F.R. § 5.2(n)(4) (App. 271a), but continued the injunction with respect to the remaining helper regulations. *Building and Construction Trades Department, AFL-CIO, et al. v. Donovan*, 102 Lab. Cas. (CCH) ¶ 34,648 (D.D.C. 1984). App. 101a-103a. The district court's December 21, 1984, order stated that the Secretary could later submit reissued regulations concerning helpers, and the rules would be approved if they conformed to the court of appeals' decision.

3. The Second Helper Regulation

Three years later, the Secretary issued a revised proposal, asking for comment on five alternative methodologies attempting to determine when "helper" classifications "prevail" in a locality. None of the proposed methodologies took into account the prevailing practices of "various classes of laborers . . .". 40 U.S.C. § 276a. App. 520a. *See*, 52 Fed. Reg. 31366. App. 155a-180a. No further action on this second "helper" proposal was taken during the remaining eighteen months of the Reagan Administration.

The rule challenged in this proceeding, the second "helper" rule, was promulgated on January 27, 1989, immediately following the inauguration of President Bush, by then-Acting Secretary of Labor Dennis E. Whitfield during the transition between administrations. 54 Fed. Reg. 4234. App. 115a. The Acting Secretary moved the district court to vacate its still-outstanding injunction of the first helper regulation, dating from 1984, so that the newly adopted helper regulations could be implemented. 54 Fed. Reg. 4234-4244 (January 27, 1989). App. 115a-154a.

4. The Second District Court Decision

The district court granted the Secretary's motion to vacate the injunction, over opposition from the Building Trades, *et al. Building & Constr. Trades Dep't v. Dole*, 29 Wage & Hour Cas. (BNA) 1607, 116 Lab. Cas. (CCH) ¶ 35,395 (D.D.C. 1990). App. 60a-71a. In its September 24, 1990, Order, the district court concluded that the revised "helper" regulations met the requirements of the Davis-Bacon Act, and were consistent with the court of appeals' 1983 decision.

The Secretary then published a Notice that the new "helper" regulations would become effective on February 4, 1991. 55 Fed. Reg. 50148-50 (December 4, 1990). App. 104a-114a. The Building Trades, *et al.*, asked the district court to issue an injunction pending appeal, in order to preserve the status quo. The District Court denied the motion on January 20, 1991. *Building and Construction Trades Department, et al. v. Dole*, Case No. 90-5345 (D.D.C. January 30, 1991). App. 98a-100a. As a result, the new "helper" regulations became effective on February 4, 1991.

5. The Dire Emergency Supplemental Appropriations Act of 1991

On April 10, 1991, President Bush signed into law the Dire Emergency Supplemental Appropriations For Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration,

Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991 ("Dire Emergency Supplemental Appropriations Act"), Pub. L. No. 102-27, 105 Stat. 130 *et seq.* App. 523a. Section 303 of the Dire Emergency Supplemental Appropriations Act provides in relevant part that:

> *Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer* the regulations published at 54 Federal Register 4234-44 (January 27, 1989) to be codified at 1.7(d), 5.2(n)(4), 5.5(a)(1)(ii)(A) and 5.5(a)(4)(iv) of Title 29 of the Code of Federal Regulations to implement or administer any other regulation that would have the same or similar effect[.]

(Emphasis added.)

Pursuant to the mandate in Section 303 of the Dire Emergency Supplemental Appropriations Act, the Secretary of Labor temporarily refrained from implementing the helper regulations, until President Bush signed the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1992, Pub. L. 102-170 (hereafter "Labor-HHS 1992 Appropriations Act") into law on November 26, 1991.[1]

6. The Labor-HHS 1992 Appropriations Act

While the appeal of the "helper" regulation was pending before the court of appeals, the Department of Labor's proposed 1992 Budget was submitted to the Congress. It included a specific request for $750,000 and 13 full-time employees (hereafter "FTE's") for DOL's Employment Standards Administration ("ESA"). The funds and staff were designed to implement the new helper regulation.[2]

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[1] After the end of fiscal year 1991, the Secretary implemented the helper regulation. All Agency Memorandum No. 161 (U.S. Dept. of Labor, January 29, 1992).

[2] Hearings Before the Subcommittee on Departments of Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess. 1162, 1210 and 1214 (1991). App. 387a-395a.

The House Committee on Appropriations specifically denied DOL's request, explaining that:

> The committee has been informed by the Department of Labor that it is in compliance with the *permanent prohibition contained in the Dire Emergency Supplemental Appropriations Act of 1991 concerning implementation of the Davis-Bacon helper regulations.* The committee believes therefore that the Department of Labor's request for additional funding to implement the Davis-Bacon helper regulations is unnecessary. *Section 303 of the Dire Emergency Supplemental Appropriations Act of 1991 (P.L. 102-27) permanently prohibits the Secretary of Labor from expending any funds to implement or administer the helper regulations.*

H.R. Rep. 121, 102d Cong., 1st Sess. 17 (1991) (emphasis added). App. 398a. The House of Representatives passed the Labor-HHS 1992 Appropriations Act on June 26, 1992. 137 Cong. Rec. H5131 (daily ed. June 26, 1992).

Similarly, the Senate Committee on Appropriations denied DOL's request for funds and staff to implement the helper regulations. However, the Senate version of the appropriations act differed from the House version in one important respect. While both the House and Senate versions expressed the permanency of the spending ban, the Senate version specifically excised the $750,000 from the DOL budget request. The report explained that:

> A requested increase of 13 FTE's and $750,000 is denied the Wage and Hour Program *reflecting the permanent prohibition on implementation of the Davis-Bacon helper regulations enacted in section 303 of Public Law 102-27.* The Committee has been informed by the Department of Labor that it is in compliance with the permanent prohibition contained in the Dire Emergency Supplemental Appropriations Act of 1991 concerning implementation of the Davis-Bacon helper regulations. The Committee believes, therefore, that the Department of Labor's request for

> additional funding to implement the Davis-Bacon helper regulations is unnecessary.

S. Rep. No. 104, 102d Cong., 1st Sess., 19-20 (1991). App. 402a-403a. The Senate passed the Labor-HHS 1992 Appropriations Act on September 12, 1991. 137 Cong. Rec. S12848-99, S12914 (daily ed. Sept. 12, 1991).

Thereafter, on November 1, 1991, the Conference Committee appointed to reconcile the House and Senate versions of the Labor-HHS 1992 Appropriations Act agreed to adopt the Senate's lower spending figure. Its report explained that the $750,000 in funds appropriated to ESA and the denial of DOL's request for 13 FTE's needed to administer the helper regulation "reflects the permanent prohibition on implementation of the Davis-Bacon helper regulations enacted in section 303 of Public Law 102-27." Conf. Rep. No. 282, 102d Cong., 1st Sess. 17 (1991). App. 406a.[3]

Congress adopted the Conference Committee's version of the Labor-HHS 1992 Appropriations Act, with its elimination of any funds for implementing the helper regulations and its declaration of the permanency of the spending ban of the earlier Dire Emergency Supplemental Appropriations Act. 137 Cong. Rec. H9418-67 (daily ed. Nov. 6, 1991). On November 9, 1991, President Bush vetoed the Labor-HHS 1992 Appropriations Act because it provided funding for abortion counselling. 137 Cong. Rec. H10491 (daily ed. Nov. 19, 1991). The House of Representatives failed to override the President's veto. 137 Cong. Rec. H10491-10508 (daily ed. Nov. 19, 1991). Congress then deleted the abortion counselling provision from the bill. The Act was unchanged in all other respects, and reflected the deletion of the $750,000 (and 13 FTE's) requested by DOL to implement

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[3] The appendix to the Conference Report sets forth "the amounts agreed to for each program, project or activity with appropriate comparisons." The $750,000 reduction is reflected in the overall $231,326,000 ESA appropriation. *See* App. 401a.

the new helper regulation. 137 Cong. Rec. H10856 (daily ed. Nov. 22, 1991) (App. 409a-410a) and 137 Cong. Rec. S17782 (daily ed. Nov. 22, 1991). App. 411a-412a. The same Congress for the third time then voted to permanently bar implementation of the helper regulation.

On November 26, 1991, President Bush signed the Labor-HHS 1992 Appropriations Act as Pub. Law 102-170.

7. The Second Court of Appeals Decision

The Building Trades, *et al.*, in their appeal from the district court's decision to vacate its injunction, argued that Section 303 operates permanently to repeal the Secretary of Labor's authority to implement the new helper regulations. On December 3, 1991, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and ¶ IX(8) of the Handbook of Practice of the United States Court of Appeals for the District of Columbia Circuit, the Building Trades, *et al.* submitted a letter bringing to the court of appeals' attention the legislative developments concerning the Secretary of Labor's 1992 Budget Request.

Thereafter, on April 26, 1992, the court of appeals, in *Building and Construction Trades Dep't v. Martin*, 961 F.2d 269 (D.C. Cir. 1992), affirmed in part and reversed in part the district court's order vacating the 1982 injunction against implementation of new "helper" regulations under the Davis-Bacon Act. The court of appeals, *inter alia*, rejected the challenge by the Building Trades, *et al.* to the Secretary's authority to implement the new "helper" regulation based on the fact the Section 303 rider to the Dire Emergency Supplemental Appropriations Act of 1991 prohibited the Secretary from spending funds to implement the helper regulation. App. 7a-10a. The court also determined that the tests for prevailing use of helpers and the definition of helper were consistent

with the Act and the court's 1983 decision. *Id.* at 274-76. App. 10a-15a.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANCE OF THE STATE INTERESTS AND LABOR RELATIONS INTERESTS AT ISSUE

The Davis-Bacon Act is one of our nation's oldest labor statutes, originally enacted in 1931 and amended in its present form in 1935. Prevailing wage laws, many modeled after the federal law, exist in thirty-one states. The Davis-Bacon Act has bipartisan roots[4] and has enjoyed bipartisan support since its enactment by Congress. During the course of the last sixty-one years, Congress has expanded its coverage to over sixty related statutes which provide federal funding or assistance to construction.[5] In so doing, Congress continually has recognized the critically important role of the Davis-Bacon Act in the nation's economy through its protection of the wages and fringe benefits of hundreds of thousands of construction workers, and through ensuring that qualified construction contractors perform federal construction contracts in a safe and efficient manner. *See, Universities Research Ass'n v. Coutu*, 450 U.S. 754, 776 (1981); *Walsh v. Schlect*, 429 U.S. 401, 411 (1977); *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954). Indeed, at any

[4] The Davis-Bacon Act was originally sponsored by Republican Senator James Davis and Republican Representative Robert Bacon and was signed into law by President Herbert Hoover. *See* S. Rep. No. 1445 (January 26, 1931).

[5] The Davis-Bacon Act itself applies only to construction contracts directly with the federal government. However, Congress recurrently has included Davis-Bacon protections in other statutes that provide federal funding for construction activities to other entities like state and local governments, or grantees. A list of these statutes, referred to as the "Davis-Bacon Related Acts," may be found at 29 C.F.R. § 5.1 (1991). App. 261a-266a.

one time, the Davis-Bacon Act applies to "[s]ome 600,000 contracts" and "approximately $43 billion is spent annually for construction work covered by these statutes [the Davis-Bacon and Related Statutes]." 543 F. Supp. at 1291. App. 95a.

Most of the four million laborers and mechanics represented by the Building Trades, *et al.*, in the construction industry are employed, from time to time, on these federal and federally-assisted construction projects covered by the Davis-Bacon and Related Acts. Affidavit of Robert Georgine at ¶ 2, App. 432a (hereafter "Georgine Aff."). The consequences of this case are immediate and profound for these working men and women. Many of these laborers and mechanics currently employed on federally funded construction projects will be forced to accept lower "helper" wages. Affidavit of John T. Dunlop at ¶ 8, App. 476a (hereafter "Dunlop Aff."); and Affidavit of George A. Miller at ¶¶ 9-18, App. 444a-446a (hereafter "Miller Aff."). Other journeymen and laborers will lose employment opportunities as contractors bidding for new construction contracts substitute lower-paid helpers for experienced workers. Miller Aff. at ¶ 18, App. 446a. Dunlop Aff. at ¶ 11, App. 477a. And, finally, many contractors employing laborers and mechanics represented by the Building Trades Department, *et al.* will be unable or unwilling to compete for federally funded construction projects because they are bound by collective bargaining agreements which do not permit employment of "helpers," or because they are concerned about their ability to provide quality construction if they employ poorly-trained or untrained semi-skilled or unskilled "helpers" to perform tasks formerly performed by skilled mechanics. Miller Aff. at ¶ 17-22, App. 445a-447a. The result will be a drastic reduction of employment opportunities for workers employed by these contractors. For this reason alone, this case warrants this Court's attention.

II. THE DECISION BELOW CONFLICTS WITH THE DAVIS-BACON ACT BECAUSE IT DOES NOT TAKE INTO CONSIDERATION THE "VARIOUS CLASSES OF LABORERS . . ."

The Building Trades, *et al.*, and most particularly the Laborer's International Union of North America, demonstrated to the court of appeals that, in fact, the newly-adopted regulation would result in the wholesale substitution of helpers for laborers who work under the supervision of journeymen mechanics and that "laborers", the very class of workers that will be displaced most often by lower-paid helpers, were nowhere considered by the Secretary. In upholding a helper regulation that does not take into account the prevailing practices of "various classes of laborers . . ." (40 U.S.C. § 276a) (App. 520a), the decision below violates the Davis-Bacon Act. The Secretary's methodology which the court of appeals approved is nothing more than the "identifiable" standard which the first court of appeals decision held violated the Davis-Bacon Act's requirement that "mechanics and laborers" on federal and federally-assisted construction be paid the "prevailing" wage in the locality in which they are employed. 712 F.2d at 624-626. App. 40a-46a.

Under the "helper" rule before this Court, the Secretary now will use two alternative methodologies for determining whether the use of "helpers" should be recognized as a "prevailing" local practice. 29 C.F.R. § 1.7(d)(1), (2); 54 Fed. Reg. 4243. App. 150a-152a.[6] Neither

[6] The Secretary's methodology provides:

> If the prevailing wage for a particular journeyman classification is a wage that is paid to the majority of the journeymen in the classification as defined in § 1.2(a)(1) of this part, *then the practice followed by those contractors whose rates are adopted as prevailing for the journeyman* shall also be deemed the prevailing practice in determining whether to issue a helper classification. App. 151a.

It further provides:

methodology counts "laborers", the most numerous construction classification and the very classification which is most likely to be performing the duties now to be assigned to helpers. *See* Affidavit of Carl Booker at ¶ 5-17, App. 446a-473a (hereafter "Booker Aff."); and Affidavit of James Warren at ¶ 30-41, App. 461a-464a (hereafter "Warren Aff."). The first methodology is used by the Secretary to determine whether the use of "helpers" "prevails" in union-dominated areas. Under the rule, in union-dominated areas the Secretary will recognize a "helper" classification in collective bargaining agreements of contractors whose union *journeyman* classifications are found to prevail, even if the employment of the "helper" job title is *de minimis* and if the *prevailing practice* among contractors is to hire union laborers to perform the semi-skilled work of assisting journeymen. The recognition of non-prevailing helper classes will occur because the Secretary's methodology completely fails to consider the wage data derived from laborers employed by contractors in the locality. 29 C.F.R. § 1.7(d)(1). App. 151a.

The second methodology provides a formula for determining whether to recognize a "helper" classification in localities where the "weighted average" method is used. Generally, these are situations where no single wage rate accounts for a majority of the laborers or mechanics in each individual trade. Under this methodology, the Sec-

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> If the prevailing wage for a particular journeyman classification is the average of the wages paid to the journeymen, weighted by the total numbers of journeymen in the classification . . . , then *the total number of workers* in the classification employed by contractors utilizing helpers (*journeymen plus apprentices, trainees, and helpers* . . .) on reported projects *will be compared to the total number of workers in the classification* employed by contractors not utilizing helpers (*journeymen plus apprentices and trainees* . . .) and the practice which covers the majority of such workers shall be deemed the prevailing practice. . . . App. 151a-152a.

retary's rule compares two groups of contractors: the contractors who hire helpers (generally, nonunion contractors), compared against the contractors who do not hire helpers (generally, union contractors). On the nonunion side, the Secretary counts the total number of journeymen, apprentices, trainees and helpers, while on the union side she counts the total of journeymen, apprentices and trainees. App. 132a-139a. *Under the regulation, laborers are not counted*, even where they may be the prevailing craft in the area performing semi-skilled work under the direction of local journeymen. App. 129a-131a.

Because the "various classes of laborers . . ." are left out of this methodology, the rule will inevitably recognize a low-wage "helper" classification even where the use of helpers does not prevail. The methodology, therefore, must result in underclassification and underpayment of laborers on projects covered by Davis-Bacon provisions, in plain violation of the statutory mandate and the court of appeals' first decision that workers be paid no less than locally prevailing rates. *See U.S. v. Binghamton Const. Co.*, 347 U.S. 171 (1954); 712 F.2d at 625. It flies in the face of the statutory command that the Secretary determine prevailing wages for "various *classes* of *laborers* and mechanics." 40 U.S.C. § 276a. "Laborers" by fiat will be written out of the statute and replaced by "classes of helpers." The Secretary cannot defeat the letter of the statute through regulatory redefinition. *See, e.g., Fertilizer Institute v. U.S. Environmental Protection Agency*, 935 F.2d 1303, 1309 (D.C. Cir. 1991).

III. THE DECISION BELOW CONFLICTS WITH THE DOCTRINE OF THIS COURT, AND MISAPPLIES THE ADMINISTRATIVE PROCEDURES ACT, BY UPHOLDING A RULE THAT IS NOT SUPPORTED BY THE RECORD, AND WHICH IS JUSTIFIED MERELY BY AN ASSERTION OF THE SECRETARY'S "EXPERIENCE"

Since the helper regulation first was proposed in 1982, the Secretary has been unable to articulate a rational underpinning for the rule's impact on construction laborers.[7] From the beginning, the Secretary interpreted the new helper classification to be one that encompassed some of the duties of both laborers and journeymen. As a result, the rule would allow contractors to assign laborers' duties to lower-paid helpers:

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[7] The record in this rulemaking shows that construction laborers traditionally perform semi-skilled work; directly assist skilled journeymen and commonly earn a higher wage than "helpers". Administrative Record 000277-000749 ("Ad. Rec."). *See* "General Wage Determinations issued under the Davis-Bacon Act (U.S. Dept. of Labor, 1987). App. 479a-519a. The work of the laborer overlaps substantially the work of the "helper" and the defintion of a "helper" is so broad that it can include virtually any of the duties of a journeyman or laborer. *Infra*, n. —. The "laborer" job classification has ancient roots, generally including all the workers on the job who were not within the skilled trades as "masters," "journeymen" and "apprentices." Their work includes a variety of components, including "serving" the skilled trades—preparing work areas for journeymen, hauling supplies to journeymen, mixing materials such as mortar or plaster, positioning materials, etc. This "serving" component of laborers' duties is known in the industry as "tending" or "helping" the skilled journeyman. *See* Dunlop Aff. ¶ 15, App. 428a-429a.; Booker Aff. ¶ 5-8, App. 466-468a; Warren Aff. ¶ 30-40, App. 461a-463a; Miller Aff. ¶ 8-20, App. 443a-446a. These duties are specifically listed in the Secretary's new definition of a "helper" as a worker "[who] performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools . . ." 29 C.F.R. § 5.2 (n)(4). App. 152a-153a.

> Once the helper regulation is in effect, the more likely situation is one in which helpers would in some instances replace laborers as well as journeymen . . . *This puts the average estimate [of cost savings] at $363.16 million assuming that helpers, in fact, replace both laborers* and journeymen. This estimate also represents our "best guess" about the likely impact of the final regulation.

47 Fed. Reg. 23651 (emphasis added). App. 209a.

All parties relied upon the Secretary's construction of the rule throughout both administrative rulemaking proceedings. In fact, the certainty that low-wage helpers would be substituted for higher-paid laborer was so self-evident to everyone involved in the construction industry that it was unquestioned. The overlap in the duties of helpers and laborers was freely acknowledged by the largest construction employer group in the nation. Ad. Rec. 000036. The first court of appeals decision also understood that low-wage helpers would displace laborers. 712 F.2d at 626. App. 44a.

The second "helper" rulemaking was initiated August 9, 1987, when the Secretary issued five proposed, alternative methodologies for determining when classifications of helpers are "prevailing" in a locality. 52 Fed. Reg. 31366-67. App. 158a-161a. Once again, each of the five alternative proposals was interpreted as allowing helpers to perform laborers' duties, and the preamble to the second proposed rule stated that "where it has been determined that helpers prevail, *helpers will substitute for laborers* as well as journeymen." 52 Fed. Reg. 31370 (emphasis added). App. 171a-173a. The Secretary calculated annual cost savings under the 1987 proposal of $532 million ("midpoint savings"), explaining that half of the allowable helpers would substitute for journeymen, and half would substitute for laborers. 52 Fed. Reg. 31370. App. 172a. However, *none* of the options provided a methodology under which the prevailing practices of laborers would be taken into account.

In the 1987 comments of the Laborers' Union on the five proposed, alternative methodologies, its central objection to all options was that each failed to count wage data of laborers when determining whether the use of helpers prevailed in the locality. Ad. Rec. 00229-00275. App. 123a-124a. Because the record showed that helpers will substitute for laborers, and because the Secretary's regulatory impact analysis predicted cost savings based on low-wage helpers substituting for laborers, the Laborers' Union pointed out that it was both illogical and contrary to the Davis-Bacon Act not to count the wage data of laborers when determining whether the use of "helpers" is prevailing practice. Ad. Rec. 000229-000233, 000271-000275. App. 123a-124a.

When the second final helper rule was issued, the Secretary still did not devise a methodology that would consider the wage data of "various classes of laborers . . ." as required by Davis-Bacon Act. Instead, the Secretary did a complete turn about, capriciously adopting a rationale for her rule that never had been articulated in the rulemaking process. Without any notice to the parties, the Secretary suddenly abandoned her longstanding interpretation of the rule, and asserted that the wage data of laborers need not be considered when determining whether "helpers" prevail. 54 Fed. Reg. 4237-4238; 4240; 4242. App. 128a-130a, 138a, 146a-148a.

The sudden and unsupported reversal in the Secretary's analysis of the rule's effect on laborers also compelled a change in the Secretary's regulatory impact analysis. 54 Fed. Reg. 4242. App. 146a-147a. Whereas the Secretary consistently had asserted since 1982 that the projected savings from implementing a "helper" rule would be produced by substituting low-wage helpers for higher-paid laborers, her changed "understanding" of the structure of the construction industry compelled her to conclude that

> it is highly unlikely that helpers will substitute for laborers as the Preliminary Regulatory Impact Analysis ("PRIA") suggested may occur . . . Accordingly,

> *the Department is withdrawing the portion of the analysis which contains estimates of cost savings for where helpers substitute for both laborers and journeymen.*

54 Fed. Reg. at 4237-4242 (emphasis added). App. 146a-147a.

Agency rulemaking must be supported by the administrative record. 5 U.S.C. § 553. However, there is no evidence of any kind anywhere in the record to support the Secretary's mistaken premise that laborers do not perform the duties of helpers, or her erroneous assertion that there will be no substitution of helpers for laborers. In fact, the record shows just the opposite. *See*, "General Wage Determinations issued under the Davis-Bacon and Related Act," U.S. Department of Labor (January 2, 1987) Ad. Rec. 000277-000749 and 000036. App. 479a-518a. In lieu of evidence in the record, the Secretary cites only her "experience":

> [I]t has been *our experience* . . . that prevailing pay relationships . . . [are] in direct proportion to skill levels, and semi-skilled helper rates are above the unskilled laborer's rate. . . . Thus, there will be no economic incentive for contractors to replace laborer with helpers.

54 Fed. Reg. 4242 (emphasis added). App. 147a. *See also* App. 138a.

Judicial review of an agency's action must be evaluated "solely by the grounds invoked by the agency," with the agency articulating a "rational connection between the facts found and the choice made." *SEC v. Chenery Corp.*, 332 U.S. 783 (1947); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29 (1983); *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986). Here, the sole ground invoked by Secretary is her "experience," with no attempt to tie her rule to the record.

The failure of the Secretary to rely upon record evidence and to offer a rational basis for her rulemaking warrants this Court's attention. When an agency's rule is not sup-

ported by the record, it is deficient under the standards of the Administrative Procedures Act and must be rejected. *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1124 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 227 (1985). This Court's doctrine on this issue is uncompromising. Standing alone, the failure of the Secretary to explain her regulation based on the administrative record is sufficient to invalidate the rule. *Chenery, supra.* Rejection of such a rule is even more compelling where the record, as here, flatly contradicts the Secretary's rationale. *Motor Vehicles Mfrs. Ass'n, supra* at 42 (agency regulation is arbitrary and capricious if the agency has offered an explanation that runs counter to the evidence before it.).

IV. THE DECISION BELOW CONFLICTS WITH THE DOCTRINE OF THIS COURT UNDER THE ADMINISTRATIVE PROCEDURES ACT THAT THE REVIEWING COURT MAY NOT RELY UPON COUNSEL'S POST HOC RATIONALIZATION OF A RULE

When *promulgating* the "helper" rule, the Secretary was obligated to provide a rational explanation for the rule based on the record. 5 U.S.C. § 553. App. 524a. In *reviewing* the Secretary's regulation, the court of appeals was obligated to examine the sufficiency of the regulation based solely on the rationale offered by the Secretary in the rule itself. *Bowen v. Georgetown University Hospital, et al.*, 488 U.S. 204, 212-13 (1988)

In instances like the "helper" regulation, where the Secretary has failed to offer a rational explanation of the rule at the time of the rulemaking, a court is precluded from relying on *post hoc* explanations offered by counsel. *Id.* ("Courts may not accept . . . counsel's post hoc rationalizations for agency [orders]."; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1982). However, the court below committed exactly this error.

The Secretary's "helper" rule is precise in identifying which workers will be counted for purposes of determining whether a "helper" classification is found to "pre-

vail." 29 C.F.R. § 1.7(d)(1) and (2). App. 151a-152a. The rule includes no provision for counting laborers in its methodology. This applies both in union-dominated and non-union areas, where the Secretary's methodology counts "all workers who work in a classification (all journeymen, helpers, apprentices and trainees)", but *no laborers*. 54 Fed. Reg. 4240. App. 138a.

Athough the rule itself provided no mechanism to account for laborers, the Secretary's counsel attempted *post hoc* to provide an explanation for this omission. In its review of the rule, the court below incorrectly looked to counsel's *post hoc* arguments to find a rational basis for the regulation, opining that "the proposal . . . would give full weight to the wages normally paid to unionized laborers when calculating the prevailing wage paid to helpers." App. 138a.

However, the court did not look to the *rule itself* to justify this key assertion, nor could it—because the rule does not account for laborers. Instead, the court points only to the *post hoc* arguments of the Secretary's counsel, with the court citing as its authority the "Brief of Appellees Secretary of Labor, *et al.*" App. 12a. Sole reliance on the *post hoc* rationalizations of counsel conflicts with the standards set by this Court, requiring that an agency must provide a justification for its rulemaking within the context of the rule itself.

V. THE DECISION BELOW CONFLICTS WITH TWO RECENT APPROPRIATIONS ACTS OF CONGRESS WHICH PERMANENTLY PROHIBIT THE SECRETARY OF LABOR FROM EXPENDING FUNDS TO "IMPLEMENT" THE HELPER REGULATION OR ANY OTHER REGULATION "WITH THE SAME OR SIMILAR EFFECT"

A. Dire Emergency Appropriations Act of 1991

Following the Secretary of Labor's Notice that she intended to implement the new helper regulations on February 4, 1991, Congress overwhelmingly voted to pro-

hibit her from using any funds to implement such regulations or "any other regulations that would have the same or similar effect." [8] App. 12a.

Section 303 operates permanently to repeal the Secretary's authority to implement her new helper regulation. When Congress chooses to use an appropriations act as a vehicle for substantive legislation, courts are "bound to follow Congress's last word on the matter," as Congress "could accomplish its purpose by an amendment to an appropriations bill, or otherwise." *Los Angeles v. Adams*, 556 F.2d 40, 49 (D.C. Cir. 1977) (*quoting United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *see also, Friends of the Earth v. Armstrong*, 485 F.2d 1, 9 (10th Cir. 1973), *cert. denied sub nom. Friends of the Earth v. Stamm*, 414 U.S. 1171 (1974). Therefore, where Congress incorporates a direct prohibition against the use of moneys for a particular purpose into an appropriations act, the prohibition will have the same force and effect as other statutory law. *Adams*, 556 F.2d at 49; *Armstrong*, 485 F.2d at 9; *National Treasury Employees Union v. Devine*, 577 F. Supp. 738, 750 (D.D.C. 1983), *aff'd*, 733 F.2d 114 (D.C. Cir. 1984). Moreover, when Congress modifies a statute by an appropriations measure, the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint. *Adams*, 556 F.2d at 50.

The courts have long recognized that a restriction attached to an appropriations bill is interminable in duration if the statutory language and legislative history indicate that it is intended to be made permanent law. *Elizabeth Norcross*, 142 Cl. Ct. 763, 766 (1958). The court in *Norcross* explained:

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[8] Motions to delete Section 303 from the Dire Emergency Supplemental Appropriations Act were defeated in the House of Representatives by a margin of 244 to 173, and the Senate by 63 to 37. *See*, 137 Cong. Rec. H1533 (daily ed. March 7, 1991), (App. 314a); 137 Cong. Rec. S3544 (daily ed. March 19, 1991), (App. 321a-365a); 137 Cong. Rec. S3632 (daily ed. March 20, 1991), (App. 385a-386a).

> Then, too, even permanent legislation may be attached to an appropriation bill, and if no point of order is made against it before passage in the House, or if a special rule makes it in order, it becomes permanent legislation. But in that event it is usually accompanied by wording such as will show it to be permanent legislation.

142 Cl. Ct. at 768.

Both the statutory language of Section 303 of the Dire Emergency Supplemental Appropriations Act and its underlying legislative history lead to the conclusion that Congress intended to repeal permanently the Secretary's authority to implement the helper regulation.

An important indication of the permanency of a restrictive provision in an appropriations act is whether the provision under review is of a general nature that bears no relation to the objects or purpose of the appropriations in the act. *See, e.g., Matter of Federal Judges IV*, 65 Comp. Gen. 352 (1986); *Matter of Permanency of Weapons Testing Moratorium*, 65 Comp. Gen. 588 (1986). This is the case with regard to Section 303 of the Dire Emergency Supplemental Appropriations Act, which appropriates no funds to the Employment Standards Administration of the Department of Labor (the division charged with administering the Davis-Bacon Act), thereby compelling the conclusion that Section 303 was not intended to regulate the expenditure of funds appropriated under the act to which it is attached, but was intended instead to bar permanently the use of *any funds* "to implement the helper regulations." App. 523a.

Section 303 is found in Title III, the General Provisions title, of the Dire Emergency Supplemental Appropriations Act. App. 523a. Title III contains no Labor Department appropriations. Indeed, nowhere in the Dire Emergency Supplemental Appropriations Act are there general ap-

propriations for the Labor Department.[9] Because the Secretary is in no way dependent upon the receipt of funds under the Dire Emergency Supplemental Appropriations Act to enforce provisions of the Davis-Bacon Act, the ban on implementing the helper regulation is not tied to the life of that Act.

The court of appeals addressed this contention in *Building and Construction Trades Department, AFL-CIO, et al. v. Martin*, as follows:

> It is true, as the unions note, that the General Accounting Office (the "GAO"), in its publication, GAO, *Principles of Federal Appropriations Law*, recognizes that the absence of any appropriation for the purpose limited by the rider is some indication of permanence. *Id.* at 2-34—2-37. However, while the absence of such an appropriation may be useful in ascertaining congressional intent, standing alone it is not enough to indicate permanence. As the GAO has also stated, "the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence." *Id.* at 2-37. Similarly, as GAO has explained, "a proviso or general provision [in an appropriations act] that does not contain words of futurity will generally not be construed as permanent." *See id.* at 2-34—2-35. Principally, courts have recognized that when Congress intends a provision in an appropriations bill to have permanent effect, it uses words of permanency

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[9] The only appropriations related to the Labor Department are specific appropriations of $150 million for the Unemployment Trust Fund for state unemployment insurance administration, and $4 million from the Unemployment Trust Fund for a transition assistance program for returning veterans. The Dire Emergency Supplemental Appropriations Act also approved language that enables the Pension Benefit Guarantee Corporation to spend outside its administrative expense limit. *See*, 105 Stat. 142. Thus, the Davis-Bacon restriction is a separate and distinct provision unrelated to any funding provided to the Labor Department.

> or futurity (such as "to apply in all years hereafter"). *See* [*Minis v. United States*, 40 U.S. 132, 15 Pet. 443 (1841)]; *Norcross*, 142 Cl. Ct. at 768. In this case Congress used no words of futurity or permanency. Consequently, we do not infer from the absence of an appropriation standing alone that Congress intended to impose a permanent ban.

961 F.2d at 274. App. 8a-9a. The court of appeals further noted that:

> The unions offer snippets of legislative history in support of their argument for futurity, but legislative history can only help to explain a statute; it cannot reconstruct it. The unions also stress the presence of the words "notwithstanding any other provision of law . . ." in the rider. Pub. L. No. 102-27, § 303, 105 Stat. 130, 151. This language, however, goes to the breadth of the amendment's effect, not its duration. *Id.*

The court of appeals held that "nothing in the rider [Section 303 of the Dire Emergency Supplemental Appropriations Act] affects that ability of the Secretary to promulgate the present regulations at any time other than during the 1991 fiscal year." *Id.*[10]

The court of appeals' holding that the presence of "words of futurity" is the *sine qua non* of permanency is not consistent with decisions of the Comptroller General, which clearly hold that "use of words of futurity is not essential for an appropriation act provision to constitute permanent legislation":

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[10] As discussed below, the court of appeals' decision in *Building and Construction Trades Department, AFL-CIO, et al. v. Martin*, also did not address the subsequent action of Congress concerning its 1992 Budget Request for $750,000 and 13 FTE's for its Employment Standards Administration to implement the new helper regulations, even though it was brought to the court's attention by the Building Trades, *et al.*, *infra* at 27-30.

> The use of words of futurity is not essential for an appropriation act provision to constitute permanent legislation, "if the permanent character of the legislation is otherwise clearly indicated." 9 Comp. Gen. 248, 249 (1929). *One indication of permanence is when the provision is of a general nature, bearing no relation to the objects of the appropriation act.*

Matter of Permanency of Weapons Testing Moratorium, *supra* (emphasis added); *see also*, *Matter of Federal Judges IV*, *supra*. As stated above, Section 303 bears no relation to the objects of the Dire Emergency Supplemental Appropriations Act, nor do its terms limit its application to any other appropriation or period.

Similarly, the court of appeals' reliance on *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841), is misplaced. *Minis* concerned an interpretation of an appropriations act enacted in 1835, which, after setting forth specific appropriations, contained the following *proviso*:

> *Provided*, that no officers of the army shall receive any per cent, or additional pay . . . on account of disbursing any public money *appropriated by law during the present session* for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service of duty whatsoever, unless authorized by law.

Id. at 445. It is not surprising that the Court in *Minis* simply concluded that the proviso, consistent with its express terms, applied only to the expenditure of funds appropriated by law during the session to which the proviso itself referred. *Id.* at 447.

Unlike the proviso at issue in *Minis*, Section 303 of the Dire Emergency Supplemental Appropriations Act cannot be read to "except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it."

Had Section 303 of the Dire Emergency Supplemental Appropriations Act been enacted as a proviso to a specific appropriation contained in the Act, then the Court of Appeals' reliance on *Minis* would be warranted. Section 303, however, is *not* a proviso. Section 303 is freestanding legislation unrelated to any appropriation in the General Provisions of the Dire Emergency Supplemental Appropriations Act. Indeed, as already noted, nowhere in the Dire Emergency Supplemental Appropriations Act are there general appropriations for the Labor Department.

Moreover, the court of appeals' disparaging characterization of the legislative history of Section 303 cited by the Building Trades, *et al.*, as "snippets" is unfair and inaccurate. An examination of the relevant legislative history of the Dire Emergency Supplemental Appropriations Act conclusively demonstrates that Congress intended that Section 303 have permanent legislative effect. Both the House of Representatives and the Senate fully debated proposed amendments, the passage of which would have deleted Section 303 from the Dire Emergency Supplemental Appropriations Act,[11] before rejecting the proposed amendment, both the supporters and opponents of Section 303 of the Dire Emergency Supplemental Appropriations Act indicated, without exception, that it was intended to be permanent legislation.[12] Senate debate

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[11] *See* App. L, M and N.

[12] Representative Ford, Chairman of the House Education and Labor Committee, in support of Section 303, stated:

> I support [Section 303] because it would assure that these Davis-Bacon and apprenticeship regulations will not be permitted to take or remain in effect, in the absence of proper approval in the course of legislative consideration.

137 Cong. Rec. H1528 (daily ed. March 7, 1991). App. 293a. Representative Stenholm, who introduced an amendment to delete Section 303 from the Dire Emergency Supplemental Appropriations Act, commented, "If I lose on this amendment, it will cost us $600 million a year for the next umpteen years," *id.* at H1526 (App. 282a), thereby indicating that Section 303 will remain in effect

similarly pointed to the permanency of Section 303.[13]

Finally, the court of appeals also failed to give effect to the phrase "or to implement or administer any other regulation that would have the same or similar effect," which Congress inserted in Section 303 following the language which prohibits the expenditure of funds to implement the current helper regulations. This language shows that Congress, without qualification as to time, banned the Secretary from implementing the current helper regulations or promulgating similar regulations in the future. It is a longstanding canon of statutory construction that effect must be given to every word, clause or sentence of a statute. *Reiter v. Sonotone*, 422 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

B. Labor-HHS 1992 Appropriations Act

Any doubt as to Congress' intent in enacting Section 303 was dispelled later *in the same session of Congress*,

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unless or until Congress takes further legislative action. *See also, id.* at H1529 (statement of Representative Vento: "[Section 303] prohibits the Department of Labor from expending any funds to implement the proposed new regulations . . ." (App. 298a); *id.* at H1531 (statement of Rep. Ballenger: "The helper ban in this bill amounts to a major and expensive rewrite of the Davis-Bacon Act") (App. 305a).

[13] *See, e.g.*, Senator Nickle's description of the effect of Section 303:

> An appropriations bill is not the appropriate vehicle for introducing significant reversals in established governmental policies.

137 Cong. Rec. S3631 (daily ed. March 20, 1991). App. 328a. *See also id.* at S3627, S3630 (statements of Sen. Nickles (App. 367a-380a); *id.* at S3628-29 (statement of Sen. Adams) (App. 372a-374a); *id.* (statement of Sen. Symms) (App. 37a); *id.* at S3632 (statement of Sen. Akaka) (App. 375a-376a); 137 Cong. Rec. S3544-46 (daily ed. March 19, 1991) (statement of Sen. Nickles) (App. 322a-327a); *id.* at S3549 (statement of Sen. Adams) (App. 343a); *id.* at S3552 (statement of Sen. Helms) (App. 359a).

when Congress enacted the Labor-HHS 1992 Appropriations Act. App. 406a. However, the court of appeals' decision below nowhere gives any weight (or even mentions) these additional expressions of congressional intent regarding the "permanent" effect of Section 303 contained in the Labor-HHS 1992 Appropriations Act.

This Court has recognized that the pronouncement of a whole legislature respecting the intent of a previously enacted statute—in the form of a new statute declaring such intent—can properly be accorded "great" or "significant" weight by a court charged with construing the earlier statute,[14] although it is certainly not binding or conclusive on the issue of construction.[15] Moreover, this

[14] *Red Lion Broadcasting Co. v. Federal Communications Comm.*, 395 U.S. 367 (1969) (subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction); *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 367 (1974) (subsequent legislation declaring the intent of an earlier statute is entitled to significant weight); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980) (views of subsequent Congresses cannot override the unmistakable intent of the enacting one for purposes of the construction and interpretation of a federal law, but such views are entitled to significant weight, particularly when the precise intent of the enacting Congress is obscure); *Gozlon-Peretz v. United States*, —— U.S. ——, 111 S. Ct. 840 (1991) (the view of a later Congress does not establish definitively the meaning of an earlier enactment, but does have persuasive value).

[15] On the other hand, the Court has consistently regarded the later pronouncements of individual legislators respecting the meaning or intent of a previously enacted statute as having little, if any, weight in the judicial construction of the statute. *United States v. United Mine Workers*, 330 U.S. 258 (1947) (the views of individual Senators during debate in May, 1943, concerning the Norris-LaGuardia Act, passed in 1932, could not be accorded the same weight as if made by the same individuals in the course of the Norris-LaGuardia debates); *United States v. Wise*, 370 U.S. 405 (1962) (interpretation placed upon an existing statute by a group of Congressmen in the courts when unsuccessfully promoting later legislation can be given no persuasive effect or significance as an

Court has held that the pronouncement of a legislative commitee respecting the meaning of a previously enacted statute is entitled to considerable weight in the judicial construction of a statute, where the committee in question had reported the bill on which the statute was based, and where the pronouncement is not long after the statute's enactment. *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980); *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942); *see also, Nat'l Senior Citizens Law Center v. Legal Services Corp.*, 751 F.2d 1391 (D.C. Cir. 1985).

The decision below not only failed to accord the legislative history of the Labor-HHS 1992 Appropriations Act "great weight," it completely ignored three congressional reports which stated categorically that Congress had enacted a permanent prohibition on implementation of the Davis-Bacon helper regulations by the Secretary of Labor. Conf. Rep. No. 282, 102d Cong., 1st Sess. 17 (1991). It completely ignored the fact that Congress voted consistently with these expressions of congressional intent to reduce the DOL Budget Request by $750,000, deleting funds specifically earmarked by DOL for 13 new FTE's needed to administer the new helper regulations. The court completely ignored that the congressional reports that accompanied the Labor-HHS 1992 Appropriations Act were prepared by the same committees of the same Congress that had adopted the Dire Emergency Supplemental Appropriations Act only a few months earlier. Thus, under the circumstances of this case, the court of appeals should have given the committee reports that accompanied the Labor-HHS 1992 Appropriations Act

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aid to construction of an existing statute); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, *reh. denied*, 387 U.S. 926 (1967) (statements of Congressmen and Senators regarding their interpretation of the construction industry proviso to § 8(e) of the National Labor Relations Act could represent only the personal views of the legislators, since the statements were inserted in the Congressional Record after the passage of the Act).

great weight in determining whether Congress intended permanently to prohibit the Secretary of Labor from implementing the new helper regulation.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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